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Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-1302 and 74-1316
Consolidated

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,
Defendants-Appellants,

vs.

TURNER ELKHORN MINING COMPANY, et al.,
Plaintiffs-Appellees.

TURNER ELKHORN MINING COMPANY, et al.,
Plaintiffs-Appellants,

vs.

JOHN T. DUNLOP, Secretary of the United States Department of Labor, et al.,
Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Kentucky

REPLY BRIEF OF
TURNER ELKHORN MINING COMPANY, et al.

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STATEMENT

1. The questions raised by these appeals center on the rationality, in the constitutional sense, of federal legislation requiring coal mine employers to pay benefits to former and present employees for physical disability caused by a single occupational disease known as coal workers' pneumoconiosis. A clear understanding of what is known—and not known—about that disease is essential to an understanding of many of the issues before this Court. The brief filed herein by the federal parties

is so seriously inaccurate in this regard that it threatens to obscure those issues. The government's brief conveys the misleading impression that pneumoconiosis may develop in a coal miner long after his exposure to coal dust has ceased, and that it will inexorably progress in its development until the miner is totally physically disabled. (See Fed. Br. pp. 5, 10, 23). The legislative history of the law reveals an overwhelming consensus of medical evidence to the contrary. According to this evidence, if a miner does not have pneumoconiosis at the time his exposure to coal dust ceases[1] he will not develop it; even if he does have it to a degree that initially is diagnosable by x-ray, it won't progress to a disabling stage after exposure ceases.[2] A miner's pneumoconiosis will progress to the disabling complicated phase (Progressive Massive Fibrosis) only if he has the simple form to an advanced degree at the time his exposure to dust ceases. Pneumoconiosis reaches the stage at which it may be progressive in the absence of coal dust only after many years of exposure, and by that time it clearly is diagnosable by x-ray.[3]

[1] Or, if the concentrations of dust to which he is exposed are reduced below a harmful level. That is why Congress has placed such emphasis in the Act on reducing dust levels in mines, and provided for transfer of susceptible miners to less dusty work environments within mines. See plaintiffs' Principal Brief pp. 56-57 (hereinafter, "Pl. Br.").

[2] See discussion and authorities cited at Pl. Br. pp. 46-48; 50-53. See also: Hearings on S. 355, S. 467, *et al.* (Coal Mine Health and Safety Act) before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 91st Cong., 1st Sess., Part 2, pp. 836-37 (1969); Hearings on H.R. 7, 8, 3333 (Black Lung Benefits Reform Act of 1975) before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 94th Cong., 1st Sess., p. 165 (1975); Morgan, *Respiratory Disease in Coal Miners*, J. Am. Med. Ass'n 1347-48 (March 31, 1975).

[3] See Pl. Br. p. 47; 1969 Senate Hearings, note 2, *supra*, at 837; Morgan, note 2, *supra*, at 1347.

The government also asserts in its brief that there are many other types of respiratory ailments caused by exposure to coal dust, and the brief implies that the Act covers them. (Fed. Br. pp. 19, 21, 37). Legislative history, however, leaves no doubt that Congress intended that compensation only be paid for disability caused by coal workers' pneumoconiosis. In 1971, it was proposed that the law be amended to cover disability from any respiratory or pulmonary disease or impairments, and their sequelae, arising out of employment in a coal mine. Congress, however, was aware that mine workers, along with some 25% of the adult males in the general population of the nation, were likely to suffer from, and be disabled by, non-work-related pulmonary diseases such as chronic bronchitis and emphysema; and there was substantial evidence before it showing it to be the overwhelming consensus of expert medical opinion that coal workers' pneumoconiosis was the only respirable disease for which there was an established occupational relationship.[4] The proposal to broaden the law was not enacted.

The description of the nature and effect of pneumoconiosis upon coal miners which the government advances in its brief appears to be designed to disguise the patently overinclusiveness of the legislation in question—the fact that miners who have not been exposed to coal dust for decades may qualify for benefits under the law, and the fact that the diagnostic standards mandated by the law encompass nonwork-related respirable diseases. The views expressed in the government's brief are flatly contrary to the views that

[4] Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 92nd Cong., 1st & 3rd Sess., Hearings on S. 2675, S. 2289, H.R. 9212, 1-21, 375-85, 409, 442-50, 465-68, 552.

the Departments of HEW and Labor, relying on the vast medical resources to which they have access, consistently expressed during congressional deliberations on this legislation.[5]

2. The government's brief also inaccurately portrays what has come to be referred to in these cases as the "retroactive" operation of the Black Lung Benefits law. The claims of former miners for which mine operators may be held liable are not limited to cases where disability due to pneumoconiosis has developed subsequent to the effective date of the Act, as the government would have this Court believe. (See Fed. Br. pp. 16, 27). The Act requires that claims be filed within three years of *discovery* of total disability due to the disease, or within three years of death due to it. Section 422 (f)(1); 30 USC 932 (f)(1). Since, as the government appears to concede, the Act expands the definition of coal workers' pneumoconiosis and disability beyond the conventional and scientific understanding of those terms (See Fed. Br. pp. 39-44), "discovery" that a miner is disabled by the disease *as defined in the Act* could only occur after passage of the Act, and through application of its diagnostic parameters, even though his physical condition may have been the same for many years.

The great numbers of former miners who have been found eligible for benefits even though they have not been exposed to coal dust for years or decades is not a medical phenomenon—it is a legislative phenomenon. Congress has, by legislative *fiat*, invented a disease unknown to medicine, given it the name of a true, medically recognized, disease and defined it as disabling in circumstances where it is not disabling. Congress achieved

[5] See discussion at Pl. Br. pp. 50-53, 58. See also: 1975 House Hearings, note 2, *supra*, at 127, 135.

this end through the use of arbitrary definitions and presumptions that have no valid foundation in medicine, and that compel diagnosis of occupational disease and disability where it does not exist in reality. If, prior to passage of the law, these cases had been presented to medical experts unfettered by such artificial definitions and presumptions, they would not have been so diagnosed, just as they would not be so diagnosed today if viewed outside the context of an application for benefits under the Act.

3. For the reasons explained at greater length in plaintiffs' Motion to Affirm in No. 74-1302 (pp. 8-10), this Court's summary affirmance of the decision of the District Court for the District of Columbia in *National Independent Coal Operators Association v. Brennan*, 372 F. Supp. 16 (hereafter, "the NICOA case"), does not foreclose consideration of the issues in these cases, as the government suggests (Fed. Br. pp. 11-12). The government's assertion that the NICOA case involved a challenge to substantially all the provisions of Title IV, and its assertion that the District Court upheld the constitutionality of the Act, misrepresent the nature of that case, its holdings, and its precedential value. The "opinion" of the District Court in the NICOA case consists merely of bare findings of fact and conclusions of law, unilluminated by a reasoned elaboration of the grounds of decision or citation of authority. The NICOA Court's statement that "Congress had the constitutional power to enact Title IV of the Act", is merely a jurisdictional finding preliminary to the Court's findings on the merits. 372 F.Supp. at 23. A holding that Congress had the constitutional *power* to enact the legislation in question says nothing of the crucial issue in the present cases, which is whether Congress has used that power in a way consistent with the Constitution.

The government's contention that the NICOA decision is a meaningful precedent upon which the issues in these cases may be resolved, is technical fiction, and the Court should not be misled by it. Plaintiffs submit that this Court, in its discretion, should consider its summary affirmance of the NICOA case as having little precedential value in the circumstances of the instant cases. See the majority opinion in *Fusari v. Steinberg*, 419 U.S. 379, 388 n. 15, and the concurring opinion of Burger, C.J., 419 U.S. at 390-92 (1975); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

ARGUMENT

I.

Plaintiffs' contention that Congress has chosen a manifestly, and unconstitutionally, irrational means for supplying relief to financially distressed former miners cannot be dismissed by simply invoking the counsels of extraordinary judicial deference to legislative judgment expressed in *Williamson v. Lee Optical Co.*,[6] and decisions of like import. As plaintiffs have demonstrated at length in their principal brief, the use of workmen's compensation mechanisms to impose liability on the former employers of individual claimants will have an arbitrarily discriminatory impact upon coal mine operators that cannot be rationalized, much less justified, by *any* characterization of the law's purpose (See Pl. Br. pp. 34-44). To agree with the government's argument that the means Congress has chosen in this instance to accomplish its ends must be accepted as entirely rational (Fed. Br. pp. 33-34) would require this Court to refrain entirely from scrutinizing the constitutionality of this legislation. The decisions of this Court cited and discussed at pages 31-32 of plaintiffs' principal brief strongly suggest that no legislation should enjoy the immunity from judicial scrutiny urged by the government here. The backward-looking nature of the liability imposed on mine operators by this legislation renders it suspect as having great potential for unfairness, and, consequently, it should be subjected to strict scrutiny.

[6] 348 U.S. 483, 488.

Neither may the "retrospective" aspects of this legislation be rationalized by reference to "settled principles of tort law", as the government maintains at pages 28-29 of its brief. The Act does not impose liability upon mine operators on the basis of rules sounding in tort, and there is nothing in the Act to suggest that Congress intended to do that. The law is framed as a workmen's compensation law—but with one critical, and constitutionally significant difference: the compensation costs imposed by this law cannot be reflected in the price of the product whose production gave rise to the liability. It is not unusual for a compensation law to impose liability for occupational disease which develops within a given time after the employment relationship has terminated, *if that potential legal liability existed during the employment relationship and therefore could be anticipated by the employer.* If an employer is aware of such potential liability he can make provisions for insuring against it and reflecting its cost in his pricing, just as he can in the case of any other potential liability. Plaintiffs, however, know of no employer-financed workmen's compensation law that affords coverage to persons who had ceased to be workmen prior to enactment of the law, and apparently the government doesn't either.

Congress failed to recognize the essential, and limited, social function of workmen's compensation laws, which is to shift the cost of work-related disability from the employee to the employer—who is capable of reflecting it in his pricing as a cost of the production that gave rise to the disability. (See Pl. Br. pp. 35-39). The benefits provided in the Act for former mine workers are not actually workmen's compensation benefits. Accurately described, they are payments in the nature of restitution

for the unavailability of workmen's compensation benefits in the past. (See legislative history discussed at Pl. Br. pp. 7-14, 34, 40-41).

II.

A. The compensation provisions of the Coal Mine Health and Safety Act were enacted for the express purpose of providing benefits to mine workers who are totally disabled by a single occupational disease. The government concedes that under this legislation mine operators may be required to pay compensation to claimants whose diseases are not work-related and to claimants who actually are not totally disabled by any disease. (Fed. Br. pp. 39, 43, 46-47).

The government maintains, however, that mine operators' constitutional rights are not implicated by the overinclusive features of the law because Congress "could have" enacted legislation requiring mine operators to pay benefits to persons suffering from respiratory diseases other than coal workers' pneumoconiosis, or to persons who are not totally disabled by the disease. (Fed. Br. pp. 43, 47, 50). The fact remains that Congress did not, or at least did not purport to, do so in the instant legislation.

Benefits are not payable under the law for disability arising from other respirable diseases, or from what might be considered sequelae of coal workers' pneumoconiosis. Congress did not intend to compensate certain claimants regardless of their present ability to work. Under the law as originally enacted, a mine worker was considered totally disabled if he was unable, by reason of pneumoconiosis, to engage in any substantial gainful activity. In 1972, over the defendants' objections, Congress broadened the definition of "total dis-

ability" to cover claimants who, because of the disease, cannot or could not find comparable work suitable to their skills and abilities. Congress did not, however, abandon the requirement that physical disability caused by the disease must be shown in order to qualify for benefits. The amended definition of "total disability" provides that:

> ". . . a miner shall be considered totally disabled when *pneumoconiosis prevents him* from engaging in gainful employment requiring skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Act, § 402(d), 30 USC § 902(d). (Emphasis supplied)

The arbitrary and overinclusive nature of the means by which Congress has attempted to achieve its purposes in this legislation cannot be justified by conjecture concerning what other purposes Congress legitimately might have written it to achieve. To uphold this law on the basis that Congress *could have* enacted it for different purposes would require this Court to assume the role of legislator and decide that Congress *would have* done so.

B. Plaintiffs contend that in this legislation Congress has erected period-of-employment presumptions governing eligibility determinations that arbitrarily imbue cases of nonoccupational disease and disability with presumptive merit, and has so hedged the claims determination process with medically invalid diagnostic limitations that those presumptions are effectively irrebutable. Plaintiffs believe that there is ample evidence in the legislative history of the law to demonstrate that there is no rational connection between the facts Congress has decreed shall be presumed, and the facts which must be proved to trigger those presumptions. If legislative history does not settle the

question, Plaintiffs believe they can present evidence to prove the irrationality of the presumptions.

This Court has recognized that the Constitution forbids the enactment of statutes that permit or compel inference of a fact from proof of another when there is no rational connection between the fact proved and the ultimate fact to be presumed therefrom, or that do not afford a fair opportunity to rebut such presumptions even where a rational connection may exist. See decisions cited at pages 60-61 of plaintiffs' principal brief; see also: *Turner v. Dep't. of Employment Security*, . . . U.S. . . ., No. 74-312, decided November 17, 1975. Determination of whether a statute does contain this vice necessarily must involve a factual inquiry of some sort. If the rule were otherwise, legislatures could decree with impunity that *any* fact could be inferred from proof of *any* other fact.

The government argues in defense of the legislative presumptions in question here, that Congress had only two alternatives: either to enact presumptions that would be overinclusive in operation, or to deprive worthy claimants of benefits. (Fed. Br. pp. 21, 39). The government maintains that the factual rationality of the presumptions is not a proper matter for judicial scrutiny; that it is sufficient that the legislative history shows there was some dispute concerning the causes and disabling effect of pneumoconiosis.

Plaintiffs submit that Congress had a third alternative. Even if it could be conclusively demonstrated that it was beyond the capabilities of medical science to identify which respiratory diseases were and which were not caused by exposure to coal dust, and what disabling effects those diseases might or might not have, it does not follow that Congress should be given a license

to legislate those facts into existence. The rational legislative alternative is to identify more clearly the purposes wished to be achieved by the law. If it was Congress' intention to compensate all coal mine workers disabled by occupational pneumoconiosis, *and* all coal mine workers disabled by nonwork-related respiratory diseases A, B, C and D, then it would have been a simple matter for Congress to have written a law saying that, and to have selected rational means for achieving that end. Plaintiffs submit that it is not beyond the competence of this Court to require Congress to proceed in that fashion in this case.

C. The government strenuously argues that this Court's recent decision in *Weinberger v. Salfi*, . . . U.S. . . ., 95 S.Ct. 2457 settles most of the issues in the instant case. That is far from true. The issues raised by plaintiffs' challenge to the legislative presumptions included in the benefits provisions of the Coal Mine Health and Safety Act differ entirely from those considered by the Court in the *Salfi* case.

Unlike *Salfi*, this case does not involve the difficult conceptual problem of determining whether statutory language ostensibly classificatory in nature actually embodies a prohibited evidentiary presumption. The statutory provisions objected to here erect explicit, unvarnished evidentiary presumptions.

The *Salfi* case involved a noncontractual claim to receive funds from the public treasury which enjoyed no constitutional protection. The instant case involves legislation affecting the rights of private parties. It imposes burdens on mine operators for the benefit of mine workers—burdens which plaintiffs contend violate their constitutional rights.

This case, unlike *Salfi*, does not involve a "prophylactic rule" designed to screen out fraudulent claims, or limit the demands on limited public resources.

Finally, and perhaps most important, this case, unlike *Salfi*, does not involve presumptions designed to foster administrative convenience or eliminate cumbersome, expensive and time-consuming individualized determinations of eligibility for benefits. Under the legislation in question here, claims for benefits *are* processed on an individual basis, and individualized determinations of eligibility *are* required. To plaintiffs' knowledge, the Department of Labor requires the same documentation of employment history, medical examinations, and other relevant information, of all claimants whether or not their claims are governed by the presumptions. The presumptions do not eliminate individualized determinations, they merely influence, or dictate, the result that will be reached in those cases where they are applicable.

In short, the instant case involves none of the considerations which compelled this Court to the decision it reached in the *Salfi* case.

CONCLUSION

For the reasons stated herein, the judgment of the district court appealed from in Case No. 74-1302 should be affirmed; the judgment of the district court appealed from in Case No. 74-1316 should be reversed with directions to enter judgment for the plaintiffs for the relief

demanded in their complaint; in the alternative, the judgment appealed from in Case No. 74-1316 should be vacated and the cause remanded for trial.

Respectfully submitted,

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